IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 285.

UNITED STATES, EX RELATIONE, GIRARD TRUST COMPANY, TRUSTEE UNDER THE WILL OF JOHN A. BROWN, JR., DECEASED, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

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FOREWORD.

Respondent's brief is principally devoted to certain procedural objections which were held invalid by the Court of Appeals and which therefore were not discussed at length in our original brief. The purpose of this brief is to answer those objections, as well as to point out certain admissions which clarify the defence and demonstrate its entire lack of merit.

I.

THERE IS NO OTHER REMEDY AVAILABLE TO PETITIONER WHICH IS SO PLAIN, ADEQUATE AND SPECIFIC AS TO DEFEAT THE RIGHT TO MANDAMUS.

Respondent argues (Br. pp. 10-13) that, because petitioner has a right to sue for refund either in the United States District Court or the Court of Claims, it is not entitled to a writ of mandamus to compel the Commissioner to refund the overpayments, as he is directed by statute to do.

It is a cardinal rule that the mere existence of another legal remedy will not defeat mandamus unless it appears, without doubt, that such remedy is plain, adequate and specific. *Ferris on Extraordinary Legal Remedies,* p. 247. As the Court of Appeals said (R. 36):

> "It [appellant] has a judgment or the equivalent of a judgment in the order of the Board of Tax Appeals—now final—and nothing it could obtain from either the Court of Claims or a District Court would be any more adequate or specific. The statute imposes on the Commissioner the duty of making payment in accordance with the final determination of the Board; and if, as we think, this duty is mandatory, the writ here prayed for is an appropriate remedy. See Houston v. Ormes, 252 U. S. 469, 472; Cole v. Helvering, 64 App. D. C. 35, 73 F. (2d) 852; McCarl v. Leland, 59 App. D. C. 362, 42 F. (2d) 346; Lucas v. Blackstone, 59 App. D. C. 389, 45 F. (2d) 291. And if it can be shown that it ought to issue, it is of no consequence that another remedy in another tribunal might produce the same result. Knox County v. Aspinwall, 24 How. 376, 385; Blair v. United States, supra."

Neither the Court of Claims nor the District Court has more power than the Board of Tax Appeals to enforce payment of a judgment against the United States. Payment of such a judgment is a ministerial duty and, if re-

fused, may be compelled by mandamus. *Houston* v. *Ormes*, 252 U. S. 469, 472-473.

This Court has passed specifically upon such an objection to a petition for mandamus and has held that the existence of a right to sue for payment of money is no defense. *Miguel* v. *McCarl*, 291 U. S. 442, 455; *Smith* v. *Jackson*, 246 U. S. 388. See also *Miller* v. *United States ex rel. New Process Metals Co.*, 288 Fed. 434, 437 (App. D. C.).

Where the enforcement of a final order, whether of a court or an administrative tribunal, devolves by statute upon an official, as a ministerial duty, mandamus is peculiarly appropriate to compel that enforcement. *United States* v. *Black*, 128 U. S. 40, 52; *Wright* v. *Ynchausti & Co.*, 272 U. S. 640; *Posados* v. *Manila*, 274 U. S. 410; *Thompson* v. *Perris* (D. C. Calif.), 116 Fed. 769; *McCarl* v. *United States ex rel. Societa Ligure, etc.* (App. D. C.), 30 F. (2d) 561; *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 148-9.

II.

THE RESPONDENT'S DUTY TO REFUND THE SUMS HERE INVOLVED IS PURELY MINISTERIAL, NOT DISCRETIONARY.

Section 1001(d) of the Revenue Act of 1926[1] requires that the deficiencies found by the Board for 1924 and 1925, subsequently paid but disallowed by the Court of Appeals for the Third Circuit, "*shall be* credited or refunded to the taxpayer without the filing of claim therefor". Section 322(d) of the 1928 Act[2] requires that the overpayment found by the Board for 1928 "*shall be* credited or refunded to the taxpayer."

We submit that these statutes clearly and unequivocally command credit or refund, and that there is no basis for the contention that they give the respondent any discretion

[1] Discussed at pages 10 and 22-25 of our original brief, and set out in full at page 29 thereof.

[2] Discussed at page 10 and set out in full at pages 29-30 of our original brief.

whatever. In the case of *Blair* v. *United States ex rel. Union Pacific Railroad Company*, 6 F. (2d) 484 (App. D. C.), the Commissioner contended that he could not be compelled by mandamus to *credit* an overpayment against an admitted tax liability for another year, because of an alleged discretion vested in him by a similar provision in the Revenue Act of 1921, but the Court rejected his contention, saying (p. 486):

> "The duty imposed upon the respondent • • • was mandatory, not discretionary; the language of the statute is 'the amount of the excess shall be credited'; the courts therefore have jurisdiction to determine the correct construction of the statute and to compel the respondent to proceed accordingly."

The Court of Claims has expressed the same view. *James* v. *United States*, 38 F. (2d) 140, 142; *Ohio Steel Foundry Co.* v. *United States*, *supra*, p. 148. The Attorney General, in an opinion dated November 5, 1934 (*Op. A. G. 8*, published in Internal Revenue Cum. Bull. XIV-1, p. 442) said, with reference to overpayments determined by final decisions of the Board of Tax Appeals, "The duty of making refunds due in those cases is mandatory."

Respondent argues, despite these authorities, that he has discretion to determine whether he shall credit or refund because he has discretion to determine whether there are outstanding taxes due for other years (or against other related taxpayers) against which to apply a credit. He admits however that the trustee owes no other taxes, and the only liability against which he asserts the right to credit is a liability already extinguished under section 607 of the 1928 Act, a liability which section 609 denies him the right to dispose of in such fashion, and a liability of a separate taxpayer which his own rulings and numerous Board and court decisions protect against such a credit even if it were not barred. Certainly, Congress never intended to give him discretion to do an illegal act. The right to credit is con-

ditioned upon there being taxes "then due from the taxpayer".[3] If such taxes are "then due"—*i.e.*, due when the time comes to dispose of the overpayment—the Commissioner is *required* to credit. *Blair* v. *United States ex rel. Union Pacific Railroad Co., supra.* If no such taxes are then due, refund is required. The act of crediting or refunding, as the case may be, on the basis of existing facts, is purely ministerial. *Roberts* v. *United States,* 176 U. S. 221, 231; *Kendall* v. *United States,* 12 Pet. 524, 613; *Blair* v. *United States, ex rel. Union Pacific R. Co., supra.*

If the barred claims asserted against the widow are not taxes "then due from the taxpayer", it inevitably follows that respondent may be required by mandamus to refund the overpayments due petitioner. Sections 607 and 609(a), *supra,* demonstrate that there are no taxes due even from the widow, and the statutory definition of the term "taxpayer" (see Appendix to our original brief, p. 28) makes it clear that Congress did not intend to give the Commissioner authority to credit the trustee's overpayment against the beneficiary's liability (see authorities collected at p. 12 of our original brief).

The cases cited by respondent at pages 16 and 17 have no bearing upon the question. In the case of *Chicago Great Western Railroad Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, the decision turned upon the question (p. 61) "whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue." The opinion re-states (p. 61) the well-established rule that "If • • • power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and hear the case on the merits."

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[3] Section 284(a), Revenue Act of 1926; Section 322(a), Revenue Act of 1928 (Respondent's Brief, pp. 26, 28).

Here, the only question is whether respondent's refusal to refund overpayments where there are no taxes "then due" from the taxpayer making the overpayments, is a clear refusal to observe a statute requiring that such overpayments "shall be refunded." This is language of command, and brings the case within the rule announced in *Roberts* v. *United States, supra,* and followed in *Lane* v. *Hoglund*, 244 U. S. 174, *Work* v. *United States ex rel, McAlester-Edwards Coal Co.*, 262 U. S. 200, *Wilbur* v. *United States ex rel. Krushnic*, 280 U. S. 306, 318, and *Miguel* v. *McCarl, supra.* In the *Roberts* case the rule was stated as follows (p. 231):

> "Every statute to some extent requires construction of the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer."

To the same effect, see *United States ex rel. Parish* v. *McVeagh*, 214 U. S. 124; *Kendall* v. *United States supra.*

We submit that the statutory provisions here in question are so clear and precise that they do not require construction. "There can be no construction where there is nothing to construe." *Miguel* v. *McCarl, supra,* p. 453. Where an administrative officer interprets and applies a statute in a way contrary to its explicit terms, and in so doing departs from a plain official duty, the writ should issue to compel him to perform that duty. *Wilbur* v. *United States ex rel. Krushnic, supra.*

III.

RESPONDENT'S ADMISSION THAT, IN ORDER TO PROTECT HIS SO-CALLED EQUITY, THE COURT MUST SANCTION A CREDIT WHICH IS PROHIBITED BY LAW, DEMONSTRATES THE ENTIRE LACK OF EQUITY IN THE DEFENSE ON THE MERITS.

Respondent's brief serves to clarify one very important question involved in this case. In his answer (R. 21-22) he refused to say whether he proposed to *credit* the amounts due petitioner on the barred claims asserted against the beneficiary, and in his brief below he disavowed any such purpose. However, in his brief here (p. 15) he states that he "undertakes to credit the overpayment against taxes due by the beneficiary". It is therefore clear that, in order to protect the "equity" which he asserts, he asks the Court to sanction a violation by him of section 609(a) of the Revenue Act of 1928,[4] which provides that such a credit "shall be void". Respondent refrains from mentioning that section in his brief herein. He does make a passing reference to it in his brief in the companion case of *Stone* v. *White*, No. 202, October Term, 1935, but dismisses it with the dictum (pp. 20-21) that it does not affect his right to defend a suit for refund of an amount applied as such an illegal credit, where the barred tax was at one time due. We respectfully refer the Court to pages 16 and 20-21 of our original brief for a discussion of this untenable proposition.

Respondent's asserted right to make such a credit also conflicts with the rule, established by administrative rulings and followed for years by the Board of Tax Appeals and the courts, that an overpayment may be credited only to the particular taxpayer who made the payment. It is sig-

[4] Discussed in more detail at pages 16 and 17 of our original brief, herein.

nificant that none of these authorities[5] is mentioned by respondent.

It is apparent therefore, that respondent's plea of "equity" is simply this: That the law prohibits him from making the credit; that the operation of this law prevents him from collecting, out of funds deposited with him for another purpose, taxes which he should have collected but failed to collect within the statutory period; and that this result is so inequitable, the Court should sanction his violation of the law and sustain his decision to make the illegal credit. We submit that there is no equity in such a plea.

It is also to be observed that, unless section 607, *supra*, is to be set at naught, respondent asks the Court to permit him to do a vain thing. If, as respondent contends (Br. pp. 18-19), the money paid by petitioner in reality was a payment by Mrs. Brown, the credit which respondent seeks to make would result in overpayments by her, and she could recover the same amounts in a subsequent suit for refund. *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th).[6] If the Court sustains respondent's position here, it would simply be postponing the date on which respondent would be required to make the refunds here demanded.

IV.

RESPONDENT ADMITS THAT THE THEORY OF RECOUPMENT IS OF DOUBTFUL APPLICATION TO A SUBSTANTIAL PART OF PETITIONER'S CLAIMS FOR 1924 AND 1925, AND HIS APPLICATION OF THE THEORY TO THE 1928 CLAIM IS BASED UPON A MISCONCEPTION.

In our original brief we have attempted to show that the theory of recoupment has no application to this case because (pp. 14, 17) of lack of mutuality and because (pp. 17-18) the claims against the widow do not arise out of any transaction upon which petitioner's claims are based. The

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[5] Discussed at page 12 of our original brief.

[6] Cf. *United States* v. *Piedmont Mfg. Co.* (C. C. A. 4), C. C. H. Stand. Fed. Tax Serv., par. 9220.

Court of Appeals did not base its decision upon the theory of recoupment,[7] but respondent now seeks to sustain that decision, in part, upon such a theory.

In his brief, respondent concedes (p. 23) that there is some doubt as to whether the widow's liability for 1926 and 1927 may be recouped against amounts due petitioner for other years, and offers no argument whatever that the 1926 and 1927 claims against her are connected with the same transactions out of which petitioner's claims arose. Obviously, no such contention can be made, and it follows that petitioner is entitled *at least* to the excess of its 1924 and 1925 overpayments above the respondent's claims for the same years. This excess amounts to $9,161.58 for 1924 and $6,876.11 for 1925.[8]

In attempting to answer our argument that the same transaction did not give rise to the claims asserted on each side, respondent contends (Br. pp. 23-24) that petitioner for 1928 paid taxes on "the same income" which the widow erroneously failed to include in her return, namely, the income properly distributable to her under the will. The record does not support this statement. Petitioner in its 1928 return deducted such distributable income (R. 3, 17). The Commissioner asserted a deficiency because he proposed to disallow that deduction. Petitioner did not pay that deficiency, but appealed to the Board, which held that there was no deficiency but an overpayment under the return (R. 4-5, 18-19). Obviously this overpayment did not represent a payment of tax on the income distributable to the widow, but a payment of tax under the trustee's return which, as stated, did not include such distributable income as taxable.

Under respondent's own theory of recoupment, therefore, petitioner is clearly entitled to at least the excessive pay-

[7] In the opinion below (R. 37), the court said: " * * * we may lay aside altogether the disputed legal right of the United States to a counterclaim or recoupment."

[8] Petitioner paid $42,732.19 for 1924, and the claim against the widow for that year is only $33,570.61; for 1925 petitioner paid $22,405.95, while the claim against the widow for that year is only $15,529.84 (R. 4, 5, 24).

ments above mentioned for 1924 and 1925 and the entire overpayment for 1928.

CONCLUSION.

Respondent's justification for his refusal to obey the plain provisions of a statute is that the command, if obeyed, would effect an inequitable result. He thus proposes to substitute for the rules provided his own concept of fairness. We submit that there is here no room at all for any discussion of "equities" on either side. The efficient administration of a complex taxing system has required a set of rigid rules. To permit those rules to be variously applied, depending upon an official's notions about the predominant "equities" in particular situations, would result in endless confusion. Equity will in the end be achieved by uniformity and certainty in tax administration.

Respectfully submitted,

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